SUPREME COURT, U. S.
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in the Supreme Court of the United States

OCTOBER TERM, 1973

CASE NO. 73-684

ELIAS GANEM,

Petitioner,

vs.

HERLINDA GANEM de ISSA, VICTORIA GANEM de JACIR, SUSANA GANEM de VIVEROS, and OLGA ANDRAUS VDA. de GANEM,

Respondents.

On Petition for Writ of Certiorari to the Florida District Court of Appeal, Third District and/or the Supreme Court of Florida

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

INTRODUCTION

The same references and symbols as were used in the Petition for a Writ of Certiorari will be utilized in this Reply Brief. In addition, references to the Respondents' Brief will be through use of the symbol "R.B."

STATEMENT

Respondents have repeatedly contended that the fact (assumed by Petitioner for the sake of argument) that all persons interested in Ganem & Co. and La India are before the Court in essence "cures" any defect in the proceedings resulting from the fact that the companies have never been parties to the suit [R.B. 2] Petitioner does not accept this argument and invites the Court's attention to the New York litigation (Petition, p. 12) where the Respondents' effort to cause the companies to enter the proceedings was thwarted. It is submitted that inherent in the Respondents' actions in New York was a recognition of one of Petitioner's primary points of contention: that the two companies, not the Respondents, are the real parties in interest in this action or, at the very least, that the companies are indispensible parties. In either event, the absence of the companies from the litigation would constitute a defect going to the validity of the Final Judgment entered by the Florida Court.

The Respondents' Brief (beginning at R.B. 4) generally describes the grounds upon which the trial court based its action in striking Petitioner's Answer. However, since the correctness of this action involves a question of due process, the appropriate starting point is the Order itself, which is reproduced as Appendix I of the Petition

for Certiorari heretofore filed, and which should be considered in conjunction with the Order of November 23, 1971 (Appendix H of the Petition). According to these Orders the Answer was stricken because of several prior orders which held Petitioner in contempt. Tracing the contempts back, it appears that there are two principal events which precipitated the subsequent contempts.

The first is Petitioner's failure to deposit certain funds into the Court registry.

The second "event" is Petitioner's failure to comply with an Order of accounting. It is this second Order which the Respondents choose to characterize as an order of "production" [R.B. 5] in an effort to bring it within the scope of Rule 1.380(b)(2), Florida Rules of Civil Procedure (sanctions). The correct characterization of that Order, it is suggested, is material to the disposition of one of the main issues presented in this entire proceeding: the propriety of striking the Answer.

The only other part of the Respondents' characterization of the facts which warrants comment at this juncture is the reference [R.B. 6] to certain information supposedly imparted to Respondents by "Petitioner's New York counsel," to the effect that a certain bank account had a value of $1,500,000 in 1967. In fact, the Record in this case does not support that assertion. The Record does suggest that at one point, during settlement negotiations, such a sum was mentioned. However, there is nothing in the Record which permits the conclusions that those funds were in any way related to the 1959 transfer of funds mentioned in the Complaint.

REPLY TO POINT I OF RESPONDENTS' BRIEF

[BY REASON OF HIS CONTINUING CONTUMACIOUS CONDUCT, PETITIONER IS NOT ENTITLED TO CALL UPON THE RESOURCES OF THIS COURT FOR A DETERMINATION OF HIS CLAIMS AND HIS PETITION SHOULD BE DISMISSED.]

The principal argument presented in Point I of Respondents' Brief is that the Petition should be denied because of the outstanding and unpurged contempts entered against this Petitioner in the lower court. In support of this contention the Respondents cite to several criminal cases, all of which, it is submitted, are inapposite. There is a sufficient, independent body of case law dealing with the effect of *civil* contempts on appellate proceedings such that reference to criminal proceedings is totally unnecessary and unwarranted.

It should be pointed out that the identical position was taken by the Respondents in the Florida appellate courts. The one appellate court which considered the merits of the case refused to dismiss the appeal on the grounds stated. See Petitioner's Appendix B [App. 15].

However, and more importantly, it is Petitioner's position that Respondents' argument—that this case should not be reviewed by this Court due to the contempts, is not viable for the reason that Petitioner was denied due process of law in the Florida courts. The right to review (or to appeal) is not essential to due process *provided* due

process has already been accorded in the trial court. This Court recently stated the rule to be just that:

> "This Court has held that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review [citations omitted]." *Lindsey v. Normet*, 405 U.S. 56, 31 L.Ed.2d 36, 92 S.Ct. 862 (1972). See also *Leahigh v. Beyer*, 116 N.E.2d 458 (Ohio Ct. Com. P. 1953).

Respondents have relied primarily on the case of *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 99 L.Ed. 46, 75 S.Ct. 92 (1954). In *National Union*, the Petitioner had objected to the dismissal of its appeal by a state appellate court based on the argument that it was thereby denied due process of law. This Court offered the following commentary on the point:

> "The constitutional objection raised by petitioner was long ago considered in *Hovey v. Elliott*, 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841. In that case, the Supreme Court of the District of Columbia *went further and attempted to deprive a defendant of his right to answer the suit brought against him. Having stricken defendant's answer, the court entered judgment against him as a punishment for his refusal to deliver to a court-appointed receiver certain funds which were the subject matter of the litigation.* When the State of New York later refused to honor that judgment, *this Court*, in affirming the action of the Court of Appeals of New York, *held that the*

District of Columbia had deprived defendant of his property without due process of law by denying him his constitutional right to a day in court.

"The instant case does not go so far. Here the petitioner has had its day in court. The dismissal has cut off only a statutory right of review after a full trial by judge and jury. In *Hovey v. Elliott (U.S.)*, *supra*, this distinction was anticipated and room was left open for a later consideration of cases like the one before us." [Emphasis added.] 348 U.S. 37, 41, 99 L.Ed. 46, 50.

Petitioner submits that the foregoing is consistent with its previous argument, to the effect that the right to dismiss an appeal exists only if due process has been accorded in the lower court.

Therefore, it is the other issues being argued in this case which must be resolved first. If Petitioner is correct in his contention that he was denied due process of law when the lower court struck his Answer, or by the lower court's failure to apply Colombian law to the issues in this case then, it is submitted, it would not be proper for this Court to refuse to grant the Petition (on this ground alone).

REPLY TO POINT II OF RESPONDENTS' BRIEF

[ON PETITIONER'S REFUSAL TO SUBMIT TO DISCOVERY, STRIKING HIS ANSWER AND RENDERING A DEFAULT JUDGMENT AGAINST HIM WAS A SANCTION IMPOSED IN ACCORDANCE WITH THE LAWS OF FLORIDA AND THE DECISIONS OF THIS COURT.]

The Respondents' argument under this Point ignores the thrust of the matters raised in the Petition (Point II). The Respondents have simply argued that the decision below is in accord with the cited decisions of this Court.

In point of fact, Petitioner argued that the decision of the Florida Courts reaches a result which is contrary to this Court's holdings in *Hovey v. Elliott*, 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841, and *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 53 L.Ed. 530 (1909).

Obviously, the fact that the lower court said that it based its decision on the *Hammond Packing* case does not mean that either that Court's application or understanding of the case was correct.

The trial judge based his actions on various outstanding orders with which Elias had not complied. These orders fall into two basic categories. The first group relates to Elias' failure to comply with an order to deposit funds into the court registry. Under the holding of *Hovey v. Elliott, supra*, it is clear that the contempt order resulting

from Petitioner's failure to deposit the funds is not a constitutionally adequate basis for striking an answer and entering a default judgment.

The second category relates to Elias' failure to comply with an order to account. Respondents seek to equate such an order with an order for discovery (production of documents) so that the sanction rule in the Florida Rules of Civil Procedure can be utilized.

That argument—that the lower court had the authority to strike an answer and enter a default judgment, to be valid, requires two things. First, there must be authority vested, by statute or rule, in the lower court to strike the answer. Second, in order for the answer to be stricken and a default entered there must be presumptions of fact which can properly be made, by virtue of the failure of a party (Petitioner) to produce evidence, to support the judgment. The difficulty inherent in engaging in presumptions in the instant case is made apparent by the number and complexity of the issues presented. It is clear that the trial judge made no attempt to articulate the presumptions upon which his Final Judgment was based. He merely assumed everything against Petitioner.

Whereas Respondents recite a series of facts, or events, which tend to evoke a negative emotional response against Elias, they fail to meet the substance of Petitioner's argument.

The rule of procedure which the Florida District Court of Appeal said provided the authority for the trial court to strike Petitioner's Answer is Rule 1.380(b)(2), Florida Rules of Civil Procedure (30 F.S.A.). [App. 16]

None of the Orders of the trial court, including the Final Judgment, refers to this rule as authority for the court's actions.

Of greater significance is the fact that Rule 1.350 provides for sanctions for failure to comply with the *discovery* rules. The rule is explicit as to what discovery orders, if not complied with, may justify the striking of an answer. It includes orders for the production of documents; however, in this regard the language very carefully refers to ". . . an order made under Rule 1.350 to produce any document or thing . . ." The only order in the instant case which is remotely related to an order to produce is the summary judgment for an accounting. Petitioner submits that that judgment is not "an order made under Rule 1.350" and, as a consequence, Rule 1.380(b)(2) does not constitute authority for the court's actions in this case. Without the Rule to validate the lower court's actions the actions fall within the acts prohibited by *Hovey v. Elliott*, *supra*, as being contrary to the requirements of Due Process of Law. Respondents' Brief refers to no authority which treats accountings as orders of production within the purview of the discovery rules.

Beyond this there is the equally significant question of whether Petitioner's actions give rise to, or warrant, the incredibly broad presumptions of fact in which the trial court had to engage to justify its actions. It should be recalled that according to *Hovey v. Elliott* a court does not have the inherent power to *punish* a contemnor by striking his answer and entering a default judgment. The *Hammond Packing Company* case, however, says that such action is constitutionally permissible if, *inter alia*, where essential presumptions of fact may be made as a result of

the failure of a party to produce evidence. The Respondents do not really rebut this facet of Petitioner's argument, so he will stand by the argument contained in the Petition.

The point is that the Florida courts, in striking Petitioner's answer and entering a default judgment against him, violated the requirements of the Due Process Clause of the Fourteenth Amendment.

REPLY TO POINT III OF RESPONDENTS' BRIEF

[THE LAW APPLIED BY THE TRIAL COURT IN SUPPORT OF ITS JUDGMENT HAS NOT DEPRIVED PETITIONER OF ANY CONSTITUTIONAL OR TREATY RIGHT.]

In this Point the Respondents' attempt to respond to Petitioner's argument that the failure of the lower court to apply Colombian law to the issues in this case violated his due process and treaty rights.

It should first be pointed out that at no point do the Respondents suggest that the substantive law which would determine whether certain civil law companies, Ganem & Co. and/or La India, are the real parties in interest or indispensable parties could be anything other than that of Colombia. In fact, the Respondents' own analysis of the *Cuba Railroad Company v. Crosby*[1] case tends to substantiate Petitioner's position here. On page 18 of their Brief the Respondents, referring to the *Cuba Railroad* case, observe that it was held that Federal courts could not assume

[1]222 U.S. 473, 56 L.Ed. 274, 32 S.Ct. 132 (1912).

that Cuban law would be the same as the law of the forum, in the absence of proof of Cuban law, ". . . with respect to a complex presumption as to who bears the risk of injury . . ." in a situation involving an employer. The same observation may be made of the instant case. The question is whether U.S. courts may assume, without proof of the law of the country of incorporation, that stockholders may sue in their individual capacities where they are seeking relief on behalf of the company in which they own shares. The Florida courts made "a complex presumption" as to who may sue and, for that matter, who may be sued —without reference to the controlling *civil* law. This is precisely what the *Cuba Railroad Company* case held was not permissible and what Petitioner contends is a denial of due process of law. It is this issue that is presented in this case: is proof of foreign law, when the foreign country is a civil law jurisdiction, required by the Due Process Clause under these circumstances?

A further example of where Colombian law governs rights and liabilities is the nature and extent of the fiduciary duty, if any, owed by Elias to the Respondents or to the companies. The Respondents' Complaint alleged the existence of such a fiduciary duty, and a breach thereof. Surely it cannot be contended that the existence and nature of the duty can be determined by reference to common law. (We may properly say that we know the fact to be otherwise.)

The Respondents suggest that the fact that certain Colombian law on the matter of accounting was similar to Florida law on accounting permits the inference (and presumption) that Colombian law in other, totally unre-

lated areas would also be the same. Again, we may properly observe that such an approach is legally and logically unsound.

The Florida District Court of Appeal's effort to justify the absence of proof of Colombian law relied on the sanctions provided for under the Florida Rules of Civil Procedure. The arguments contained in Point II of the Petition and Point II of this Reply Brief offer adequate rebuttal to that position.

Despite the fact that the Florida District Court of Appeal felt itself bound by the doctrine of law of the case on the issue of foreign law, this Court is certainly not bound by that doctrine on any of the issues presented. *Davis v. O'Hara*, 266 U.S. 314, 69 L.Ed. 303, 45 S.Ct. 104 (1924); *Southern R. Co. v. Clift*, 260 U.S. 316, 67 L.Ed. 283, 43 S.Ct. 126 (1922).

REPLY TO POINT IV OF RESPONDENTS' BRIEF

[THE DIRECTION IN THE FINAL JUDGMENT FOR THE PAYMENT INTO COURT OF $500,000 IS ENCOMPASSED IN RESPONDENTS' DEMAND IN THE COMPLAINT FOR AN ACCOUNTING.]

Respondents' statement of this issue is not accurate.

It is difficult to understand how Respondents can seriously argue that the Final Judgment did not award them $500,000 as a result of the Trans American promissory notes when the language of the Judgment specifically states that Elias is to deposit the sum with the Clerk

". . . *to be divided among the parties.*" [Emphasis added.] The fact that the actual division of the funds may be the subject of a subsequent Order does not change the substance of the Final Judgment: Elias was held liable and the Respondents ("the parties")—not the companies—were held entitled to the funds.

As to Respondents' suggestion that the Trans American promissory notes were encompassed in the fifth cause of action (accounting) in their Complaint, it should be pointed out that the notes were obligations of Ganem & Co. and La India—the absent indispensable parties. What will happen when Trans American tries to collect on the notes? Should it go against the companies? Elias? Respondents? May not Ganem & Co. and La India still bring actions against this Petitioner on the note transactions?

The Complaint is specific as to the particular activities of which the Respondents are complaining (see pages 10, 11 and 12 of the Petition). There is absolutely no reference to the notes in the Complaint. With the pleadings in that posture Respondents proceeded to a trial in which Petitioner was not permitted to participate.

CONCLUSION

In conclusion, Petitioner respectfully submits that the Respondents have *not* succeeded in demonstrating that the issues presented in this case can be decided on state as opposed to Federal grounds. Further, it is submitted that the issues presented are substantial and important issues which this Court should consider and decide and that the due process rights of which Petitioner, a foreign national, has been deprived by the Florida courts are significant and should be likewise considered by this Court.

Respectfully submitted,

_____of

HELLIWELL, MELROSE
& DeWOLF
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail, to William C. Lewis, Jr., Esq., Smathers & Thompson, Attorneys for Respondents, 1301 Alfred I. duPont Building, Miami, Florida, this 10th day of December, 1973.

_____

Attorney